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may render great aid to the States by repealing laws which favor the establishment of monopolies.

Nothing has done so much to favor the creation of monopolies as the high protective tariff system which has been the policy of this government for so many years. The lowest possible tariff, consistent with the economical administration of the government, is a most important step in the direction of breaking down monopolies.

It is far wiser and safer to seek to establish a condition of things unfavorable to the growth of monopolies than to try to suppress them by governmental interference, State or Federal. It is not always an easy thing to say what is a monopoly, nor is it an easy thing to determine when or how far a State may wisely use its power to suppress it. But whatever may be the power of the State or the reasons for its exercise in the particular case, we cannot too jealously watch any interference upon the part of the general government; "and acknowledged evils, however grave and urgent they may appear to be, had better be borne, than the risk be run, in the effort to suppress them, of more serious consequences by resort to expedients of even doubtful constitutionality."

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HOMESTEAD EXEMPTION.

The word "Homestead," in its usual legal signification, means the house and curtilage set apart for a family residence, and exempt from forced sale for the debts of the householder. Art. XI, sec. 1, of the Constitution of Virginia provides for an *exemption* of real and personal property of a householder or head of a family, to an amount not exceeding \$2,000; and sec. 5 of Art. XI provides that "the General Assembly *shall*, at its first session under this Constitution, prescribe in what manner and on what conditions the said householder or head of a family shall thereafter set apart and hold for himself and family a homestead out of any property hereby exempted, and *may, in its discretion*, determine in what manner and on what conditions he may thereafter hold, for the benefit of himself and family, such personal property as he may have, and coming within the exemption hereby made." (*Italics mine*).

It will be observed that the Constitution made it compulsory on the legislature to provide for a "Homestead," but left it entirely discretionary as to any provision for holding personal property exempt. The Constitutional provision was not self-executing, but required legislation to put it into effect. If the legislature had failed or refused to pass the necessary laws there could have been no homestead and no exemption, and yet no power, save the people, in whom resides the sovereignty of the State, could have compelled the necessary legislation. But the legislature did enact the necessary *statute*, not only to provide for the "Homestead," but also for the exemption of personal property, and this statute is now embodied in Chapter 178 of the Code.

It will be observed further that the word "Homestead" appears in only three places in Art. XI of the Constitution, to-wit: in its title, and in sections 5 and 6. In sec. 6 it only appears in reciting the title of an Act of Assembly which is thereby repealed. In sec. 5, however, a clear distinction is drawn between a "Homestead" and personal property exempt. The Act of Assembly which put the Constitutional provision into operation kept up this distinction, and only applied the term "Homestead" to that portion of the exempt property which was set apart in real estate. The "waiver" clause, however, though containing the word "Homestead," was made to apply not only to the "Homestead" as such, but to the personal property set apart as exempt. The present Homestead law, as found in Chapter 178 of the Code, still maintains a distinction between exemptions of real and of personal estate, but probably the most notable feature of the chapter is that the word "Homestead" nowhere appears in it. This is one of the changes wrought by the Revisors. In the waiver clause the word "Homestead" is also omitted, and the present form of the waiver is "I (or we) waive the benefit of my (or our) exemption as to this obligation." Notwithstanding this change, however, the old form of waiver ("I hereby waive the benefit of my Homestead exemption as to this obligation") is still the one in common use in all commercial transactions. This may arise from ignorance of the change in the law, but more probably from a fear to change existing forms which have stood the test, lest the new form may include more or less than the old. The new form is substantially the same as the old with the word "Homestead" omitted—an omission made necessary by change of the phraseology in other parts of the Act.

The "Homestead Cases," 22 Gratt. 266, decided that Art. XI, sec. 1, of the Constitution of the State, and the Act of the General As-

sembly in pursuance thereof, approved June 27, 1870, so far as they provided an exemption against contracts made before the adoption of the Constitution and the passage of the Act, were repugnant to that clause of the Constitution of the United States which prohibits a State from passing any law impairing the obligation of a contract, and therefore void.

The Constitution was ratified by a vote of the people July 6, 1869, but the Act of Assembly prescribing "in what manner and on what conditions" the homestead should be thereafter set apart and held was not approved till June 27, 1870—nearly a year afterwards. In the "Homestead Cases" the debts were all contracted before the adoption of the Constitution, and hence no question arose as to the validity of the exemption against contracts made between these two dates, nor are we aware of any case involving this question. The Constitution, however, does not seem to be self-operative, but in express terms to require an Act of the legislature to carry it into effect, and hence it is believed that the exemption provided by the Act of June 27, 1870, cannot be claimed against any contracts except those made after that date and in which there is no waiver.

The legislature, however, by Act approved April 29, 1867, (Acts 1866-67, ch. 139, p. 962), passed a Homestead Law before the adoption of the Constitution. This, of course, so far as it was retrospective was unconstitutional, but we can see no reason why it was not valid against all contracts thereafter made. The legislature had full power to pass any law *not prohibited* by the Constitution of the State, or of the United States, and this was not prohibited. We do not know of any case which arose under this Act. The Constitution expressly repealed the Act of April 29, 1867. Art. XI, sec. 6.

WHO MAY AND WHO MAY NOT HOLD A HOMESTEAD.

The Constitution and the Act of 1870 each says "every householder or head of a family shall," &c., but the Code says *every householder residing in this State* shall be entitled to hold.¹ The Court of Appeals have held that "householder," as used in the Act of 1870, means substantially the same as head of a family, and where there is a relation of dependence and support, coupled with a legal or moral duty to support the dependent, then there is a head of a family—a chief of the family—and this head of a family, "a householder," is

¹ Sec. 3657 declares that "householder," as used in chap. 178, shall be equivalent to "householder or head of a family."

entitled to the benefit of the exemption.¹ There may be a head of a family, who is not, strictly speaking, a householder, but under the ruling of the court in the case just cited, holding the two terms "householder" and "head of a family" to be practically equivalent terms, such "head of a family" would be entitled to have the benefit of the exemption. But an unmarried man, with no children, or other persons dependent upon him living with him, is not a *householder* within the meaning of the Act. The case of *Calhoun v. Williams*, just cited, also decided that where there was no family there could be no homestead. It followed as a necessary consequence that if there had once been a family, but it had ceased to exist, the homestead would likewise cease to exist. The Court of Appeals saw the effect of this, and to this extent overruled *Calhoun v. Williams*, declaring that if there was a family at the time the homestead was claimed, the exemption should continue during the lifetime of the head, notwithstanding the destruction of the family.² In this latter case the President, Judge Lewis, dissented, and there seems to be room for difference of opinion on the subject. It has always seemed to the writer to be an instance in which a hard case was permitted to make bad law. The case of *Wilkinson v. Merrill*, just cited, has not been since followed, and the point decided seems to admit of too much doubt to believe that the profession will accept it as finally overruling *Calhoun v. Williams*. However, the question is not likely to arise again, as sec. 3649 of the Code would seem to settle it.

The words "residing in this State" were inserted in the Code, but were not in the former law. They are, however, merely declaratory of the existing law, as it had been decided under the old Act, before the insertion of these words, that the householder must reside in the State to be entitled to the exemption.³ In the recent case of *Clendenning v. Conrad*, 91 Va. 410, the householder claimed a homestead in the proceeds of the sale of his real estate, and there was an order to pay the same to his assignee, but before payment he died, and his infant children removed to West Virginia. The non-resident guardian filed his petition in the case, setting out the facts and asking permission to remove the \$2,000, which represented the homestead, to the State of West Virginia, and there was a decree accordingly. Subsequently he was required to give bond and security, with condition to have the

¹ *Calhoun v. Williams*, 32 Gratt. 18.

² *Wilkinson v. Merrill*, 87 Va. 513.

³ *Lindsay v. Murphy*, 76 Va. 428; *Blose v. Bear*, 87 Va. 177.

principal forthcoming on the termination of the homestead estate. But neither in the briefs of counsel nor in the opinion of the court is any suggestion made that the homestead terminated by virtue of the removal. It is possible that the counsel may have taken the view that the removal did not terminate the homestead because infants cannot control their domicile; and the court may have coincided in this view, or else simply contented itself with affording the relief prayed. At all events, the point is not mentioned.

In order to be entitled to the exemption the person claiming it must not only be a householder and reside in this State, but he or she must have the homestead set apart to him or her in the manner prescribed by the Act, and if he or she fails or refuses to do so there can be no homestead.¹ It is a personal privilege and the householder must exercise it. He cannot be compelled to claim it, or to have it set apart.

If the householder entitled to claim dies before exercising the privilege, leaving a widow or minor children, they or such of them as there may be, upon petition filed for that purpose in the proper court, may have the same set apart in the real estate, or, if it be personal estate, the widow (if not again married) may set it apart, and if she be dead or married, the minor children, by their guardian or next friend, may set it apart.²

If, however, the widow has received dower or jointure from her husband's estate, she cannot claim the homestead in the *real estate* of her husband.³ Her right of exemption in his *personal* estate, however, is not affected.⁴ The whole of section 3637 is new, and was evidently intended to change the existing law. The rights of the minor children are not impaired by the new provision. But if the widow gets her dower, and then gets an exemption of \$2,000 out of the personal estate under sec. 3640, it is presumed that the infants can claim nothing under sec. 3637, as the exemption under sec. 3640 is for the benefit of the "widow and minor children." This may in some instances work a hardship on the children, but the right of the widow seems to be absolute. Nor need the children be her children. The statute does not require this, but it seems to be a necessary inference that they shall be *his*.

The homestead exemption is an exemption from liability for *debts*, and if the householder dies, leaving a widow and heirs, but no debts,

¹ *Wray v. Davenport and Others*, 79 Va. 19.

² Secs. 3636, 3640 of Code, and *Hartoff v. Wellford, Judge*, 27 Gratt. 356.

³ Sec. 3637 of Code.

⁴ Sec. 3640 of Code.

the exemption cannot be claimed by the widow against the heirs.¹ In the case of *Helm v. Helm*, just cited, there was a widow and no children, but the court says distinctly (p. 412) if there are no minor children "she cannot hold a homestead against the adult children." Nothing is said about the case where the householder leaves a widow and children, some of whom are infants and others adults, but it seems to us that the plain language both of the Constitution and the Act of Assembly gives the exemption only *against creditors*, and hence that the exemption cannot be claimed against the heirs in any case, if there are no creditors. While this seems to be plain, it might lead to an anomalous result. If a householder owning \$2,000 worth of property dies leaving a widow and two children, one infant and the other adult, and \$500 of creditors; as against the creditors the widow and infant may claim the whole \$2,000 as exempt, but not as against the adult heir. If the adult heir chooses to pay off the debts, and does so, as he has the right to do—being one of the heirs—we presume the right to claim the homestead by the widow and infant is destroyed, and the estate would then be divided as if there were no debts.

CIRCUMSTANCES UNDER WHICH HOMESTEAD CANNOT BE CLAIMED.

The homestead cannot be claimed in any of the cases excepted by sec. 3630 of the Code. These are, in the main, fairly plain, and little need be said about them. It may be observed, however, that by the very terms of the Act (sec. 3630) the exemption is only extended to any execution, order, or process issued, on any demand for *any debt or liability on contract*, and hence we are not surprised to find the court holding that the exemption cannot be claimed against torts.² Neither can the claim of homestead be asserted against a demand for taxes due the State, though the claim be asserted by the sureties of an officer.³ This is prohibited by clause *fourth* of the exceptions to sec. 3630.

Nor can the claim of homestead be asserted against a demand for services rendered by a laboring person or mechanic. Who is "a laboring man?" The court says, "We think it safe to say that the word 'laborer,' when used in its ordinary and usual acceptation, car-

¹ *Helm v. Helm's Adm'r*, 30 Gratt. 404.

See *Barker v. Jenkins*, 84 Va. 895. The husband set apart the homestead in his lifetime, and died leaving adult children, and it was held that the homestead ceased.

² *Whiteacre v. Rector*, 29 Gratt. 714; *Benton v. Mills*, 78 Va. 468; *Frazier v. Baker*, 5 Va. Law Journal, 565.

³ *Commonwealth v. Ford*, 29 Gratt. 683.

ries with it the idea of actual, physical and manual exertion and toil, and is used to denote that class of persons who literally earn their bread by the sweat of their brows, and who perform with their own hands, at the cost of considerable labor, the contracts made with their employers. The framers of that instrument [the Constitution], in giving to a large class of persons a homestead, clearly designed that it should not affect that class of persons who were dependent upon their own manual labor for the support of themselves and their families, and whose necessity for the prompt and certain payment of their wages they regarded as paramount even to the claims of the debtor to a homestead.”¹ Applying this definition to the case in judgment, the court held that a *mail carrier* was a “laboring man” within the meaning of the Constitution. Since this decision the legislature has declared that the term “laboring man shall include all householders who receive wages for their services.”²

The words “or liability on contracts” in lines six and seven of sec. 3630 are new, placed there by the Revisors, probably to make clear the existing law, *possibly* to extend the scope of the exemption. The comma after the word “attorney-at-law” in the *third* exception to the exemption is omitted both in the Constitution and in sec. 3630. This may be an omission in printing, though it is rather singular that it should have occurred in two places. The comma is in both of these places in the Code of 1873, and as the Revisors could not change the Constitution, the presumption is that they did not intend to change the Act. Punctuation, however, it is said, is no part of a statute.³ See, however, what is said in 1 Va. Law Register, at p. 630.

The homestead cannot be claimed against any debt or liability on contract, as to which the debtor or contracting party has waived the benefit of the exemption as provided in the Act. And it is immaterial as to whether the waiver was *before* or *after* the homestead had been set apart. In either case the waiver is valid.⁴

If two or more persons are engaged, as partners, in commercial pursuits, in which it is necessary or customary to execute negotiable paper containing a waiver of the homestead, it is believed that the signature of the firm name, in the usual course of business, by any member of the firm, to such a note, will be sufficient to waive the ex-

¹ *Farinholt v. Luckhard*, 90 Va. 936, 938.

² Acts 1887-8, ch. 349, p. 423.

³ 105 U. S. Rep. 77, 84-85.

⁴ *Reed v. Union Bank of Winchester*, 29 Gratt. 719; *Linkenhoker v. Detrick*, 81 Va. 44.

emption of each and every member of the firm. This would seem to result from the nature of the transaction and the rights of the partners among themselves. But it seems to have been held otherwise in Alabama.¹

If the surety on a bond containing a waiver of the exemption pays the bond, the question will at once arise, can the principal claim the homestead against the surety when called on to pay the debt? By analogy to the construction placed on the Bankrupt Act it would seem that he may. The action is no longer on the bond, but grows out of the relation of the parties. The bond has been paid, and "a bond on which principal and surety are both bound, once paid by the surety in the lifetime of the principal, without assignment by the creditor or agreement to assign, is forever dead as a security as well in equity as at law. There can be no subrogation in such a case."²

If a debt has been contracted and a *lien* therefor has attached to the property of the debtor *before he becomes a householder*, he cannot claim the homestead as against such debt. The *lien* of the creditor is superior to the right to claim the exemption. The judgment is a *security* within the meaning of Sec. 3, Art. XI, of the Constitution.³ If, however, the debtor, after contracting the debt, but before any *lien* therefor has attached, becomes a householder, we presume he *could* claim the homestead against the *debt*, as the *lien* alone gave the *security* which prevented the claim of homestead in the case just stated.

It is worthy of notice that in *Kennerly v. Swartz*, cited in the notes, the court declares that the *judgment* was "a *security* within the meaning of the Constitution," but makes no reference to *White v. Owen*, 30 Gratt. 43. In this latter case the court went into an elaborate examination of the meaning of the different words of that Article of the Constitution. The language construed in both cases is contained in Sec. 3, Art. XI, and is as follows: "Nothing contained in this Article shall be construed to interfere with the sale of the property aforesaid, or any part thereof, by virtue of any mortgage, deed of trust, pledge or other security thereon." In *White v. Owen* the court said: "Other security means, of course, security of a like character; that is, such as is created by his own act." In *Kennerly v. Swartz*, the court, in speaking of a judgment obtained before the judgment debtor became a householder or head of a family, says: "It was a *security*, within

¹ *Vincent v. Hurst*, 76 Ala. 588, as cited in 9 Am. & Eng. Ency. Law, 488.

² *Cromer v. Cromer's Adm'r*, 29 Gratt. 280.

³ *Kennerly v. Swartz*, 83 Va. 704.

the meaning of the Constitution.” It is true *White v. Owen* was decided by a divided court, but there was no dissent on this point. If the rule *ejusdem generis* is applicable, it would seem that *White v. Owen* is right, but it is doubtful if the rule, however well established, has been productive of more good than harm. In *Kennerly v. Swartz* justice was reached, and we favor the application of the rule which will attain that end. If that end cannot be attained by the application of general rules, apply the exceptions, and if there are no exceptions, make them.

In *Blose v. Bear*, 87 Va. 177, there was a judgment against a debtor, and after the recovery of the judgment he gave a deed of trust on his real estate. He then claimed a homestead in the same land on which he had given the deed of trust, and finally removed from the State. In a contest between the judgment creditor and the deed of trust creditor, the court held that the judgment had priority. The case arose before the enactment of the Code, and it is not stated whether the debtor was a householder at the time of the recovery of the judgment, but it is presumed that he was. Under the provisions of sec. 3649 of the Code, would the trust creditor take priority?

If a debtor fraudulently convey his property to defeat his creditors, and the conveyance be thereafter set aside for such fraud, the debtor may claim his right of exemption in the property thus fraudulently conveyed, though the deed be perfectly valid between the parties.¹ It is said that the creditor is placed just where he would have been if no fraudulent deed had been made, and that he cannot claim anything more than this. He cannot be allowed “to blow hot and cold in the same breath.” He cannot say that the deed is void and not void, or that the property is the property of the debtor and is not his property. So far as the creditor is concerned, the setting aside the deed simply affirms that the property conveyed is still the property of the debtor, and if his he may claim the homestead in it. This proposition was much controverted at first, but is now settled in this State, at least, by the cases cited in the note. In *Rose v. Sharpless*, 33 Gratt. 153, the homestead deed was set aside because it was said to be a part of a scheme to defraud the creditors, and further that the goods paid for were so commingled with those not paid for that they could not be separated, and hence no homestead was allowed at all. It was doubtless a most outrageous case of fraud, but the court went further, and

¹ *Shipe, Cloud & Co. v. Repass*, 28 Gratt. 716; *Boynton v. McNeill*, 31 Gratt. 456; *Marshall v. Sears*, 79 Va. 49; *Hatcher v. Crews' Adm'r*, 83 Va. 371.

held that, if the homestead deed was executed by the debtor as a part, and in furtherance, of a design to hinder, delay, and defraud his creditors in the recovery of their just debts, the deed would be vitiated thereby. We are not disposed to concur in this view. The whole object of the homestead law is to enable the debtor to shield his property from liability for the payment of his debts. He *cannot* claim his homestead against anybody except his creditors. They are the only people from whom he desires to shield it, and to say that if he sets apart his homestead for the purpose of shielding his property from his creditors the deed is void is simply to defeat the law itself. This may be very sound morals, but as a legal proposition it does not commend itself to our judgment.

If a householder die owing debts, on some of which the homestead had been waived and others not, and the claim of homestead exemption is asserted by his widow and infant children, that portion of his property not embraced in his homestead should be first applied *ratably* to *all* his debts, and, if not sufficient to pay them, then those creditors holding a waiver of the homestead exemption may resort to the homestead for the payment of the balance of their debts.¹ This doctrine has been criticised by an article in the *Virginia Law Journal*, but it seems to be a fair construction of the Act.²

If the entire amount of the homestead has not been set apart, additional amounts may be set apart in the manner prescribed by the law, until all the successive amounts set apart aggregate \$2,000, but in no event can the sum of all the successive amounts set apart exceed \$2,000.³

After a homestead has been claimed and the deed making the declaration of homestead has been admitted to record, though the infant children or dependents of the family may derive a benefit therefrom, still no estate has been carved out of the homestead of the husband, and the *husband and wife* may unite in a deed and alien or encumber it.⁴

The case of *White v. Owen*, cited in the note, was decided by a court of four judges, Judge Burks being absent. In that case a deed of trust was given on the homestead after it had been set apart, and husband and wife united in the deed. In the course of his opinion Judge Anderson expressed the view that a deed of trust on the homestead in which the wife did not unite "would effectually subject it to the pay-

¹ *Strange v. Strange's Adm's*, 76 Va. 240; *Scott v. Cheatham*, 78 Va. 82; *Richardson v. Butler*, 1 Va. Law Jour. 120.

² See Code, sec. 3648.

³ Code, sec. 3646; *Oppenheim v. Howell*, 76 Va. 218.

⁴ *White v. Owen*, 30 Gratt. 43; Sec. 3634 of the Code.

ment of the debt. For it is in effect, and to all intents and purposes, a waiver of his right to exemption." Judge Christian concurred in the opinion of Judge Anderson, but Judges Staples and Moncure declined to express any opinion on the question, saying it did not arise in that case. As the law then stood the waiver had to be declared in the body of the bond, note or other evidence of the debt. Now it may be either in the bond, note, etc., or by a writing thereon or annexed thereto. (Sec. 3647 of the Code.) Both then and now the statute forbids *alienation or encumbrance* of the homestead by a married man "except by the joint deed of himself and wife," Code 1873, ch. 183, sec. 7; Code 1887, sec. 3634. It is evident that the legislature intended to draw a distinction between a mere waiver, on the one hand, and an alienation or encumbrance on the other.

A householder may convey all of his property, subject to his right of homestead, and thereafter deduct his homestead as against debts not paramount to the homestead, and this deduction will be valid. He has only deducted what he had the right to claim, and no creditor can complain of this.¹

In reading the Virginia decisions on the subject of homestead we find that a number of the cases have arisen out of variance between the language of the Constitution and the Act of Assembly putting it into operation, about matters not prohibited by the Constitution. In these and all kindred questions it is only necessary to bear in mind that the legislature has power to pass all Acts *not prohibited by the Constitution*. And if an exemption is granted, or a right conferred, by an Act of Assembly, which is not *prohibited* by the Constitution, the Act is valid.

SOME OF THE CHANGES MADE BY THE CODE (1887).

We have already referred to the changes in sec. 3630 by inserting in the first line the words "residing in this State" and in lines six and seven the word "or liability on contract."

Some changes were made in the phraseology of sec. 3631 (formerly sec. 4, ch. 183, Code 1873), but they were mostly immaterial, except the substitution of a *writing* signed by the householder, instead of a *deed*, claiming the homestead in real estate.

The changes in sec. 3633 are not believed to be material. In sec. 3634 the words "or repair" in the sixth line, and the words "or it may in like manner be exchanged for," are new, and are believed to

¹ *Brockenbrough's Adm'r v. Brockenbrough's Ex'or*, 31 Gratt. 580, 596.

be important. Sec. 3635 is a redraft of a part of sec. 8, ch. 183 of the Code of 1873, and we think makes important changes in the Act. This section applies only to "*real estate set apart*." The real estate set apart is by this section to be held by the widow and *minor children*, and not children generally as in the old Act. This section also exempts the homestead from the *debts and obligations of such widow and children*, or any of them. This is new, but *possibly* merely declaratory of existing law. The other changes in the section are supposed to be intended to make more plain the existing law. Inasmuch as the homestead in the husband's estate is exempt not only from the husband's debts, but also from the debts of the widow as well, it is doubtful whether she can claim a homestead in her property, while enjoying one set apart in her husband's property. It would seem to be against public policy and the spirit of the Act. In South Carolina it cannot be done.¹

In the first and second lines of sec. 3636 the words "or not so much as the householder may have been entitled to set apart" are new, but are believed to be only declaratory of the *existing law*. We think such would have been the construction of the Act before these words were inserted.

Section 3637, as hereinbefore remarked, is entirely new and intended to change the then existing law. The widow who has received either dower or jointure cannot claim the homestead in her husband's *real estate*, though the right to claim a homestead in the personalty is left unaffected. See sec. 3640.

Sections 3638 and 3639 are recasts of sec. 11, ch. 183, Code of 1873, without material change. Section 3640 is a recast of sec. 12 with marked changes of phraseology, and it would seem with some change of substance as hereinbefore indicated. Section 3641 is a recast of sec. 13 without material change. Section 3642 fixes the time, and extends it, within which the exemption may be set apart.

Section 3643 is entirely new, and so far as real estate is concerned settles a troublesome question. It provides that if the whole real and personal estate set apart be not of greater value than \$2,000 at the time it is so set apart, the exemption thereof shall not be affected by any increase in its value afterwards, unless such increase is caused by permanent improvements on the real estate set apart. No matter how valuable this real estate becomes thereafter, unless it be by permanent improvements placed thereon, it is still exempt. If a gold mine be

¹ *Lawhorn v. Glover*, 24 S. E. 49.

discovered thereon it is exempt if no permanent improvements be placed thereon. But how about the increase of personal property? This generally increases more rapidly than real estate if not consumed. By the terms of the section it would seem that *all increase* of the personal property would be exempt.

Section 3644 is entirely new and provides a remedy for any creditor against whom the exemption is claimed to subject the excess of any homestead where too much was originally claimed, or where it has been made excessive by improvements upon real estate. The remedy is by a bill in equity. This section and the next preceding are taken substantially from the Code of West Virginia, ch. 41, sec. 33.

Section 3645 is also new. It provides how the estate shall be held, in which the proceeds of sale of exempted property are invested, or which was acquired in exchange; and how such new estate, when acquired otherwise than under order of court, is to be set apart; and when acquired through court, what is to be recorded, and where.

Section 3646 is also new, but is believed to be merely declaratory of the existing law as held in *Oppenheimer v. Howell*, 76 Va. 218, to which we have before adverted.

Section 3647 is substantially a recast of sec. 3 of ch. 183, Code of 1873, without material change except to insert the words "or by a writing thereon or annexed thereto" in the third line.

By Act of 1889-90, pp. 117-18, the judgment or decree should state the waiver where it exists, or where the claim is not subject to the exemption that fact should be stated.

The last sentence in sec. 3648 beginning "If however" is new. This is believed to be merely declaratory of the existing law.

Section 3649 is wholly new. This section provides when the homestead shall cease, to-wit, when the householder ceases to be a householder or removes from this State, or if he dies leaving a widow and minor children, when she dies or marries and the youngest child who becomes twenty-one years of age attains that age, or they all marry, if all marry before attaining that age. And when the homestead terminates it passes as other real and personal estate according to the law of descents and distributions, or as the same may be devised or bequeathed by the householder *subject to his debts*. This section further provides that the *lien* of a judgment or decree for money against the householder, which is not paramount to the exemption, shall not be enforced till the homestead ceases as aforesaid, and *then* as to the real estate it shall attach to such only of that estate as he may be

then possessed of, or entitled to—in effect declaring that the *lien* of the judgment shall not attach to the property set apart as a homestead till the homestead ceases. On the termination of the homestead it is presumed that judgments recovered against the householder in his lifetime will attach in the order of their dates as provided by sec. 3576 of the Code. This section settles a question much mooted. As the judgment creditor whose judgment is not paramount to the homestead has no lien on the homestead, he can in no wise disturb the household in its enjoyment. The case of *Williaws v. Watkins*, published in the present number of the REGISTER, decides that the householder has unlimited power of alienation or encumbrance of his homestead. He may encumber it *ad libitum*, or sell it and consume the proceeds, and the creditor is helpless. The purchaser with full knowledge of the judgment takes the homestead free of any lien by reason thereof. The creditor can take no step to preserve the *corpus* of the homestead to be forthcoming to answer his judgment at the termination of the homestead period. This results naturally from the fact that the creditor has no lien.

How far, if at all, this latest utterance of the court is in conflict with *Clendenning v. Conrad*, 91 Va. 410, the reader can determine for himself. In that case the father had claimed a homestead *in money* during his lifetime, and after his death it was paid over to the guardian of his infant children. Subsequently, on the application of a creditor of the father, the guardian was required to give bond and security for the forthcoming of the *corpus* of the homestead at the expiration of the homestead period. Under the ruling in *Williams v. Watkins* it is certain this could not have been required of the father. But the father can exercise rights over the homestead which his infant children cannot. He may waive it, they cannot. He may alien or encumber it, his wife (if he has one) uniting; the infants cannot. He may consume the *corpus*, they cannot. Inasmuch, therefore, as the guardian cannot, as a rule, dispose of the principal of his ward's estate, it does not seem unreasonable to forbid the consumption of the principal when it is in effect, if not in fact, the property of another. As the court has not distinguished between the two cases, but evidently did not regard them as conflicting, we are left to conjecture as to what the distinction is. It seems to us that we have pointed out a marked difference between the two cases.

The exemption which we have been discussing is "in addition" to other exemptions mentioned in chapter 178 of the Code. Article XI,

section 1, of the Constitution, in providing for the exemption usually called the "Homestead," expressly states that it is "in addition to the articles now exempt from levy or distress for rent," and a similar provision is found in section 3630 of the Code. The exemption which is usually called the "Poor Debtor's Law," is provided by sections 3650 and 3651, while the "laboring man," being a householder, holds his wages exempt from distress, levy, or garnishment, to an amount not exceeding \$50 per month, under the provisions of section 3652.¹

It is not necessary "to set apart" these exemptions by any writing. They are *selected* by the householder, or his agent, and then are simply *held*. But there must be a householder, and he must reside in this State. If the householder has not all the articles enumerated in sections 3650 and 3651, he cannot substitute other articles in lieu of them. He must select "so much or so many thereof as he may have." If the householder be actually engaged in agriculture, he may claim the exemption provided by section 3651, but not otherwise. Upon the death of the householder leaving a widow, minor children, or daughters who have never married, there shall be vested in them, or such of them as there may be, absolutely what would have been exempt to the householder, if alive and a householder under section 3650, but not the exemption provided by section 3651. Prior to the enactment of the Code it was a matter of doubt whether the widow and minor children could claim the exemption provided by the statute which now corresponds to section 3651. In some jurisdictions it was allowed.

The exemption, when allowed, is absolute, and the property is not liable for debts of the decedent, charges of administration or funeral expenses.² The personal representative simply takes no account of them. There is likewise exempt for the use of the family the dead victuals (or as much thereof as is necessary) laid in by the householder for consumption in his family; and any live stock necessary for the use of the family may be killed for that use before sale or distribution, without account thereof being taken by the executor or administrator.³ The provisions of sections 2649 and 3653 were formerly all included in section 14, chapter 126, Code 1873, and it was provided as to each of the exemptions that no account thereof should be made. We do not think that the change in phraseology has wrought any

¹ See Acts 1887-'8, Ch. 349, p. 423, for definition of "laboring man."

² Section 3653 of Code.

³ Section 2649 of Code.

change, in this respect, in the meaning. The former act used the words, "unmarried daughters," which is broad enough to cover widows, but section 3653 says "daughters who have never married." If there are daughters who have never married, but who do not constitute members of the household at the death of the householder, it is not clear what estate, if any, they take in the property exempted by section 3653. Certainly, the language of the section is broad enough to give them a joint interest or estate with members of the household who answer the description of beneficiaries under the section, yet the whole spirit of the law seems to be to provide for the "family"—to furnish them with the necessities of life in their hour of sorest trial. It is hardly to be supposed that the legislature intended to make this provision for those who have broken their connection with the household, and yet the subject is by no means free from doubt.

The householder, during his lifetime, has the absolute power of disposal of articles, exempt under the "sections 3650 and 3651," but, strangely enough, he cannot exercise the lesser power of encumbrance over articles exempt under section 3650. Every deed of trust, mortgage, or other writing, or pledge made to give a lien thereon is declared to be void.¹ It will be observed, however, that this restriction applies only to the articles exempt under section 3650.

The language of section 3647 seems to be broad enough to justify the conclusion that the householder cannot waive the benefit of the exemptions provided by sections 3650, 3651 and 3652. But if a householder refuse to accept the benefit of the provisions and permits his property to be sold under a *fi. fa.*, can he or his privies thereafter assert a claim to the property as against a *bona fide* purchaser? We presume not. If, however, the sale be under a deed of trust, we suppose he might assert such claim, as the statute declares the deed to be void.

There are many other interesting questions connected with this subject, but they cannot be dealt with now. We fear too great a draft has already been made on the reader's patience.

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¹ Section 3655 of Code.